No. 645.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

v.

ALFRED H. MAYER COMPANY, a Corporation, ALFRED REALTY COMPANY, a Corporation, PADDOCK COUNTRY CLUB, INC., a Corporation, ALFRED H. MAYER, an Individual, and an Officer of the Above Corporations,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS.

ISRAEL TREIMAN,
SHIFRIN, TREIMAN, SCHERMER & SUSMAN,
611 Olive Street,
St. Louis, Missouri 63101,
Attorneys for Respondents.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, QUESTIONS PRESENTED, AND STATEMENT OF THE CASE.

Respondents have no objection to the petitioners' presentation of any of these matters except as follows:

1. As to the constitutional provisions claimed to be invalid, petitioners' argument does not indicate any

reliance on the Commerce clause of Article I, or clauses 1 and 3 of Article IV, and only faint reliance on Section 4 of Article IV, of the federal constitution.

2. Of the three "Questions Presented" the second should be eliminated because we do not contend that the Civil Rights Act of 1866 was not validly enacted, either under the Thirteenth Amendment or the Fourteenth, or both.

3. The assertion in the Statement of the Case that "the allegations therein [i. e., in the Complaint] show a multiple panoply of state action" is an improper conclusion on a principal issue in the case. Furthermore, the assertions in the last paragraph of the Statement that respondents' Subdivision is **now** under "restrictive covenants" and that a "Board of Trustees appointed by the developers, **in fact, has** the power to levy assessments," etc., are not accurate. Reference to the Complaint will show that the allegation as to these matters is that respondents "have prepared or shall prepare a deed" under which "certain restrictions" **will be** established, and an association **will be** formed, and a Board of Trustees **will be** granted the power to levy assessments, etc. (Pet. App. 11a).

SUMMARY OF ARGUMENT.

Petitioners base their case on some statutory law, particularly Section 1982 of 42 U. S. C., that has survived from a Civil Rights Act enacted in 1866, and, in the alternative, on the Fourteenth Amendment, particularly the "equal protection" clause.

The first raises a question of statutory construction. Do the words "same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property" mean "right" in the sense of **legal qualification** or **competence** to inherit, purchase, etc., or do they mean something more, i. e., the right to obtain redress against a person who acts in a racially discriminatory manner? In other words, do they impose a **duty** on an unwilling seller in addition to guaranteeing the purchaser's **legal right to buy**? Petitioners contend that the statute embraces the duty as well as the right.

To this the respondents' answer is threefold. First, the framers of the Act of 1866 had no such intention. They were concerned mainly with the **laws** in a number of the southern states which continued to retain restrictions on the property **rights** of Negroes. Though they were aware that private discrimination by individuals was also widely practiced (as, indeed, it was even in states outside the South), the Act of 1866, in so far as it referred to property rights, was aimed only at **laws**, not individual conduct. Second, the judicial interpretation given to the statute since its enactment confines its scope to this original purpose, which explains why the Act "has led a relatively quiet existence and, as applied to real estate, has shown few, if any signs of life."[1] Third, if construed as the

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[1] Joseph B. Robison, *The Possibility of a Frontal Assault on the State Action Concept*, 41 Notre Dame Lawyer 455, 463 (1966). Mr. Robison is one of the counsel on the *amici* brief filed in behalf of a group of national organizations headed by the National Committee Against Discrimination in Housing.

petitioners claim it should be, the Court will have to take on some difficult and non-judicial functions. One difficulty arises out of the breadth of the language of the statute. It covers all **personal** property as well as all types of real estate. The Court will therefore face the dilemma of holding that it means what it says, which obviously would create serious problems, or ignore its language and pick out certain kinds of real estate, e. g., subdivisions, large apartment projects, etc., which would create equally serious problems and in any event would involve the Court in what is essentially a legislative function. Finally, since the statute is silent as to its enforcement, the Court will be confronted with the task of "fashioning" an appropriate remedy. The complications of such a task, combined with the problem of definition of scope, confirm the impropriety of invoking this ancient statute as a basis for the relief here sought.

As for the Fourteenth Amendment, respondents argue, first, that it does not provide a basis for relief in this case because the facts here do not meet the "firmly established" requirement of **state action,**[1] in the sense that the state is "significantly involved" in the alleged discrimination, and second, that its application here will require the Court to exercise legislative functions under gravely inappropriate circumstances.

Since petitioners and several of the *amici* build their position of state involvement on a) the local laws and regulations licensing, governing, and making services available to, the respondents, and, b) the exercise by respondents of important governmental functions, our argument is aimed at showing the fallacy underlying each of these two claimed supports. With respect to the former, we will show that it would mean elimination of any requirement of state involvement, and has been judicially

[1] *Shelley v. Kraemer,* 334 U. S. 1, 13 (1948).

repudiated. With respect to the latter, we hope to demonstrate that petitioners' argument is meaningful only as to such property as is intended for "**use by the public in general,**"[1] that is, the streets and other public areas of a subdivision, and **not** to the lots being sold for **private use as residences.**

Our second argument against use of the Fourteenth Amendment raises the question of how the court can give the petitioners a suitable remedy, without assuming difficult and improper legislative functions. In this connection we will show that there is a fundamental difference between this case and all the cases cited by the petitioners and *amici*. In those cases, either the relief, whether for damages or injunction, was provided under what is now Section 1983 of Title 42 U. S. C., concededly inapplicable here because the wrongful conduct was not "under color of any statute" etc., **or** the holding of constitutional violation **automatically** gave the complainant the relief sought. In the present case relief is not sought under Section 1983, or under any other **remedial** statute. Petitioners have only "the bare terms" of the Amendment to rely upon. This means that a holding that respondents' conduct is unconstitutional will not automatically produce any relief unless the Court "fashions the remedy." To do this will require the Court to indulge in functions for which it is not properly suited. But more important than that, the task of creating such a remedy will mean that the Court has decided to venture into the "thicket" of national policymaking on a matter that is currently under consideration by Congress itself. As to this, we cannot offer a better summary of our position than in these historic words:

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the

[1] *Marsh v. Alabama*, 326 U. S. 501, 506 (1946).

whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in **ordinary litigation between parties in personal actions** the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural.

ARGUMENT.

POINT I.

PLAINTIFFS ARE NOT ENTITLED TO RELIEF UNDER SECTION 1982 OF TITLE 42 U. S. C. BECAUSE—

A. IT WOULD REQUIRE A CONSTRUCTION CONTRARY TO THE LEGISLATIVE INTENT AT THE TIME OF ITS ORIGINAL ENACTMENT;

B. SUCH A CONSTRUCTION WOULD BE CONTRARY TO ITS USE AND INTERPRETATION SINCE ITS ENACTMENT;

C. SUCH A CONSTRUCTION WILL REQUIRE THE COURT TO ASSUME DIFFICULT AND NON-JUDICIAL FUNCTIONS.

A.

IT WOULD REQUIRE A CONSTRUCTION CONTRARY TO THE LEGISLATIVE INTENT AT THE TIME OF ITS ORIGINAL ENACTMENT.

Section 1982 of Title 42 U. S. C. (referred to in the government's *amicus* brief as Section 1978 of the Revised Statutes) is rooted in the Civil Rights Act of 1866. Its very words, "All citizens of the United States[1] shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property," are identical with the words in the Act of 1866. We therefore agree that it is important to inquire what the 39th Congress intended when it adopted that Act.

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[1] In the original enactment the phrase was "all persons born in the United States." 14 Stat. 27.

Although the petitioners' brief deals only sketchily with the congressional intent at the time of the original enactment,[2] the briefs of the government and of the National Committee Against Discrimination in Housing, et al. (hereinafter referred to as the NCADH brief) discuss it in great detail. All three briefs claim that the historical evidence shows that Congress intended more than a prohibition against discriminatory laws, such as the notorious "Black Codes", which by their express language imposed property disqualifications and legal incapacities upon Negroes that were not imposed upon whites. Petitioners assert that in addition to such "direct action of state legislatures", Congress was aiming at "discriminatory conduct of individuals condoned by the silence of state legislatures."[1] The purpose of the bill, according to the NCADH brief, "was 'to break down all discrimination between black men and white men.' The debates make it clear that this aim was not limited to discrimination by state action."[3]

The government's brief goes even further. It asserts that "the real problem for the Congress in 1866 was *not* to nullify local statutes which wholly disabled the Negro with respect to property, or even to clarify his status on this score. . . . it was that many of the Southern States, while conceding the legal capacity of the Negro to hold all kinds of property and to engage in real estate transactions, severely limited the practical exercise of these rights".[4] "In sum", says the government, "the authors of the Civil Rights Act of 1866 were obviously well aware of the true legal status of the freedman in the

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[2] Pet. br. 12-16.

[1] id 13.

[3] NCADH br. 31.

[4] Govt. br. 30-31.

South and were concerned to combat *discrimination*, not *disabilities.*"[2]

The issue is thus boiled down to the question: Did the Congress that enacted the Act of 1866 intend that it be used to prohibit discrimination not only by laws, regulations, and other **governmental** action, but also by **private** or non-official conduct? To maintain the latter is, we submit, to ignore the evidence as to the conditions which led to the adoption of the Act, as well as the statements made in Congress at the time of its adoption.

We must first make it plain that we do not claim that the 39th Congress was not aware that, despite his emancipation, the Negro in the South was being subjected to widespread mistreatment by private individuals and unofficial groups.[1] It may fairly be urged, therefore, that Congress **could have intended** to legislate against all anti-Negro discrimination, private as well as governmental. The question is, however: **Did** it so intend? To prove that it did, the government cites the legislation of several of the recently rebellious states in support of its assertion that "it does not appear that any of the Black Codes denied the capacity of the Negro to acqnire and hold property, real or personal."[3] As its references indicate, counsel for the government are apparently relying on two reports dealing with legislation relating to Negroes in the South, prepared for the 39th Congress by the Secretary of State. (Sen. Ex. Doc. No. 6, 39th Congress, 2d Sess., and H. Ex. Doc. No. 118, 39th Congress, 1st Sess.) Unfortunately, the government's historical research seems to have gone amiss, apparently because of a failure to realize the difference between the resolutions adopted at the

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[2] id 33.

[1] J. tenBroek, *Equal Under Law*, 179-80 (Collier, 1965).

[3] Govt. br. [redacted].30.

state conventions called by the provisional governors appointed by the President, and the laws that were actually enacted by the state legislatures.

The states covered by the report in the House Executive Document which is dated May 22, 1866 are North Carolina, South Carolina, Georgia, Florida, Mississippi, Alabama, and Texas, in that order. As to North Carolina, the report says that at a "convention" held in October, 1865, a resolution was first adopted prohibiting slavery, and then on October 18, 1865, another resolution was adopted which "authorized the provisional governor to appoint a committee of three persons to prepare and report to the legislature at its next session, a system of laws—in order to conform the statutes of the state to the ordinance of the convention abolishing the institution of slavery."[1] Although this committee brought in a proposed bill for this purpose, the report pointedly observes that "The Department of State is not aware that the legislature of North Carolina has yet passed this or any similar bill."[2] Yet the government in its brief describes this **proposed** legislation as being in fact "the laws of North Carolina" when Congress was debating the Civil Rights Act.[3]

Worse still is the government's erroneous reference to the next state. "Even South Carolina", it says, "reportedly one of the two least generous States on this matter . . . expressly ordained in December 1865 that 'although [persons of color] are not entitled to social or political equality with white persons, they shall have the right to acquire, own and dispose of property.' "[4] Examination of the aforesaid House Executive Document, as well as the

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[1] H. Ex. Doc. No. 118, 39th Cong., 1st Sess., 1-2.

[2] id 2.

[3] Govt. br. 30.

[4] ibid.

Senate Executive Document, reveals that no such **legislation** was ordained in December 1865. What happened was the same as in North Carolina. A convention had met, and had adopted a resolution abolishing slavery and another resolution authorizing a commission to draft legislation to bring the state statutes into conformity with the anti-slavery resolution. As in North Carolina, a commission did bring in such proposed legislation and on December 19, 1865, the convention approved what was called "An Act Preliminary to Legislation Induced by the Emancipation of Slaves," and this Act did indeed include a provision giving "slaves" and "persons of color" the right to acquire and dispose of property. But as both the aforesaid Senate and the House Executive Documents clearly indicate, the state legislature did not adopt this proposed legislation until September 21, 1866,[1] **more than six months after the Civil Rights Act was passed the first time** (March 13, 1866), **and more than five months after it was passed** (April 9, 1966), **over President Johnson's veto.**

Passing by Georgia, for the moment, we find the Secretary of State's report on Florida showing that the legislature of that state had adopted a new code pertaining to Negroes. But, except for freeing Negroes from slavery, it did nothing but impose added restrictions and increase the penalties for their violation. Certainly nothing was done about granting or expanding the property rights of Negroes.[2]

As to Mississippi, the report indicates that the only loosening by law of the Negroes' property rights was to give them the same right to acquire and dispose of "personal property and choses in action by descent or purchase" as white persons had, but even this privilege was

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[1] See the aforesaid H. Ex Doc. No. 118, pp. 5-18, and Sen. Ex Doc. No. 6, pp. 219-220.

[2] Aforesaid H. Ex Doc. No. 118, 20-24.

not to be "so construed as to allow any freed man, free Negro or mulatto, to rent or lease any lands or tenements, except in unincorporated towns or cities."[1]

The situation in Alabama is reported as being similar to that in Florida, except that some legislation had been enacted legitimizing marriages between former slaves and granting a few limited civil rights such as the right to sue and to testify. No mention, whatever, of property rights of Negroes.[2]

Georgia and Texas are the only states described in the report as having legalized the right of Negroes to acquire and dispose of any kind of property. Georgia did this by statutory law enacted on March 17, 1866, **after** the first passage of the Act by Congress.[3] Texas did it on April 2, 1866, adding a very brief article to its constitution giving "Africans and their descendants . . . the right to acquire, hold, and transmit property."[4]

Such then was the situation reported to Congress even a month **after** it had enacted the Civil Rights Act. (The House Document, as has been said, is dated May 22, 1866). In at least four of the Southern States Negroes were still being prevented **by law**, i. e., they were **disqualified, legally disabled,** from acquiring or disposing of any kind of property. In another state they were disqualified **by law** from acquiring or disposing of any but

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[1] id 24-30.

[2] id 30-32.

[3] id 18-24. It is interesting to note that just fifteen days earlier Georgia's laws prohibiting "any Negro from buying or leasing a home" were called to the attention of Congress by Congressman Windom in his speech for adoption of the Civil Rights bill. Cong. Globe, 39th Cong., 1st Sess., H. p. 1160 (March 2, 1866). See also *infra*, p. 18.

[4] id 33.

personal property, and they could not even rent or lease any real estate except in incorporated towns or cities. To assert, therefore, as does the government, that the legislators who worked for the passage of the Civil Rights Act of 1866 were "concerned to combat *discrimination, not disabilities*" is to attribute to them either blindness or callousness to a condition that cried aloud for correction by congressional action.[3]

But not only is the government's assertion regarding the contemporary laws contradicted by the very documents on which it relies. We have in addition the overwhelming evidence of the debates themselves as recorded in the "Congressional Globe" and the statements of (a) the supporters of the Act, (b) the opponents of the Act, and (c) the explanation given by President Johnson for his veto of the Act. The writers of the government and the NCADH briefs would have the court believe that all three make it clear that "the aim was not limited to discrimination by state action"[1] and that all are "inconsistent with the view that the measure merely solemnized what no one contested, that the colored man was now legally competent to own and acquire property."[2] Let us look at the record.

(a) Statements of Supporters of the Act

In the Senate, its sponsor was Lyman Trumbull, of Illinois, Chairman of the Senate Judiciary Committee. In the House, it was James F. Wilson of Iowa, Chairman of the House Judiciary Committee. Here are some pertinent

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[3] We fail to understand why the government also includes a list of liberalizing laws enacted in some of the southern states **several years after** the Act of 1866 was enacted (br. 34).

[1] NCADH br. 31.

[2] Govt. br. 31.

passages from their speeches in Congress: (All emphasis added.)

Senator Trumbull, opening the debate in the Senate on January 27, 1966:

> It will have no operation in any State **where the laws are equal**, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave **code** and **all her laws** discriminating between persons on account of race or color shall be abolished.[1]

Senator Trumbull, speaking in favor of over-riding President Johnson's veto on April 4, 1866:

> These words "under color of law" were inserted as words of limitation, and not for the purpose of punishing persons who would not have been subject to punishment under the act if they had been omitted. **If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case**, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection.[2] . . .
>
> The bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment. Each State, so that it does not abridge the great fundamental rights belonging, under the

[1] Cong. Globe, 39th Cong., 1st Sess., S. p. 476.

[2] id S. p. 1758.

Constitution, to all citizens, may grant or withhold such civil rights as it pleases; **all that is required is that, in this respect, its laws shall be impartial.**[1]

Representative Wilson, opening the debate in the House on March 1, 1866:

It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. I am aware, sir, that this doctrine is denied in many of the States; but this only proves the necessity for the enactment of the remedial and protective features of this bill. **If the States would all observe the rights of our citizens, there would be no need of this bill.** . . .

It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on account of race, color, or previous condition of slavery. . . . **Laws** barbaric and treatment inhuman are the rewards meted out by our white enemies to our colored friends. We should put a stop to this at once and forever.[2]

Representative Wilson, answering Representative Loan on the same day:

Mr. Speaker, I desire to ask the chairman who reported this bill, why the committee limit the provisions of the second section to those who act under the color of law. Why not let them apply to the whole community where the acts are committed?

Mr. Wilson of Iowa:

That grows out of the fact that **there is discrimination in reference to civil rights under the local laws**

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[1] id S. p. 1760.

[2] id H. pp. 1117, 1118.

of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.[1]

Chief of Trumbull's supporters in the Senate were Howard of Michigan and Lane of Indiana. Here is what they had to say:

Senator Howard on January 30, 1866:

What is a slave in contemplation of American law, in contemplation of the laws of all the slave States? . . . **He owned no property, because the law prohibited him. He could not take real or personal estate either by sale, by grant, or by descent or inheritance.** . . . Is a free man to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home?[2]

Senator Lane on February 2, 1866:

What are the objects sought to be accomplished by this bill? That these freed men shall be secured in the possession of all the rights, privileges, and immunities of free men; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment. **How else, I ask you, can we give them effect than by doing away with the slave codes of the respective States where slavery was lately tolerated?** . . . Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision. . . . We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the constitutional amendment; but because we believe

[1] id H. p. 1119.

[2] id S. p. 504.

they will not do that, we give the Federal officers jurisdiction.[1]

Wilson's principal supporters in the House were Cook of Illinois, Windom of Minnesota, and Thayer of Pennsylvania. Let us first see what Cook and Windom said, since both are quoted in the government's brief (60 fn).

Representative Cook, on March 1, 1866:

> What is the situation of affairs for which we are called to legislate for four million human beings who have been set free from chattel slavery . . . What do we see? In six States of the Union formerly in rebellion **laws have been passed** by the reconstructed Legislatures of those States which have been so malignant in their spirit toward these freed men, so subversive of their liberties, that the President of the United States and the commanders acting by his authority have set aside those **laws** and prevented their execution. General Thomas in Mississippi, General Swayne in Alabama, General Sickles in South Carolina, and General Terry in Virginia have issued positive **orders forbidding the execution of the laws which have passed the Legislatures of those States** against these black men. . . . The time when these men can be protected by the military power will cease. . . . Then the question is, shall we leave the men who have been loyal during this struggle, have fought on our side, and who have aided to carry the banner of the Republic in triumph through this terrible rebellion; **shall we leave them to the operation of laws** denounced as tyrannical by the military powers and as practically reducing these men to the condition of slavery? . . . **Take, for instance, the act that was passed in the State of South Carolina** and set aside by General Sickles. What is the condition

[1] id S. pp. 602-603.

of the freed man under that act? Is he secured in any right of freedom? Can any member here say that there is any probability, or any possibility, that these States will secure him in those rights? **They have already spoken through their Legislatures; we know what they will do; these acts, which have been set aside by the military commanders, are the expressions of their will. . . .**

To my mind the conclusion is irresistible that the second section of this amendment of the Constitution which gives us the right to enforce the article of the Constitution which provides against slavery or involuntary servitude, gives us the right to protect these men against precisely such a **system of legislation** as the one to which I have referred.[1]

Representative Windom, from whose speech on March 2, 1866 the government quotes a passage to show that he "does not expressly advert to the enactment of a law," not only reads excerpts from letters of military authorities in Mississippi quoting a specific section of that state's code prohibiting freed men from "the holding, leasing or renting of real estate," but goes on to refer to the laws of other states:

The State **laws** of Georgia and South Carolina, prohibit any Negro from buying or leasing a home. In North Carolina **the black code** of slavery is still in existence. In Virginia the **laws and customs** reduce the Negro to vagrancy, and then seize and sell him as a vagrant. . . .

These, sir are some specimens of protection which they get from the civil authorities of the States in which they live. They are denied a home in which to shelter their families, prohibited from carrying on any independent business, and then arrested and sold

[1] id H. pp. 1122-1123.

as vagrants because they have no homes and no business.[1]

Windom's concluding remarks are especially noteworthy because they demonstrate so incontestably that the real target of the bill was the **restrictive laws**, and not only those that were then in effect but also those that might later be enacted:

> Bear in mind the fact, too, that these wrongs are inflicted upon the freed men by communities and States while they are yet supposed to be on their good behavior for the purpose of regaining their old places of power in the Union. If such is the protection they now get **from the civil authorities of their own States**, what may we reasonably anticipate when those States again resume their places and have no favors to ask of the Federal Government.[2]

Thayer of Pennsylvania, speaking on the same day, is perhaps the most explicit of all in defining the purpose of the bill as one aimed at **laws** rather than individual conduct:

> Sir, if it is competent for the new-formed Legislatures of the rebel States to enact **laws which oppress** this large class of people who are dependent for protection upon the United States Government, to retain them still in a state of real servitude; if it is practicable for these Legislatures **to pass laws and enforce laws** which reduce this class of people to the condition of bondmen; **laws** which prevent the enjoyment of the fundamental rights of citizenship; **laws** which declare, for example, that they shall not have the privilege of purchasing a home for themselves and their families; **laws** which impair their ability to

[1] id 1160.

[2] ibid 1160.

make contracts for labor in such manner as virtually to deprive them of the power of making such contracts, and which then declare them vagrants because they have no homes and because they have no employment; I say, if it is competent for these Legislatures to pass and enforce **such laws**, then I demand to know, of what practical value is the amendment abolishing slavery in the United States? . . .

What is the necessity which gives occasion for that protection? Sir, in at least six of the lately rebellious States the reconstructed Legislatures of those States have enacted laws which, if permitted to be enforced, would strike a fatal blow at the liberty of the freed men and render the constitutional amendment of no force or effect whatever. . . . That, sir, demonstrates the necessity for enforcing the guarantees of liberty and of American citizenship conferred by the Constitution.[1]

(b) **Statements of Opponents of the Act.**

Turning now to the opponents of the Act, here is what was said on January 29, 1866 by Senator Saulsbury, one of its severest critics, a man who as former Attorney-General of Delaware was presumably well versed in legal matters:

But there has never been a time when if the State governments had been destroyed society would not have been reduced to chaos. And yet, sir, these States thus securing to the citizen all his rights of person and property, and reserving to themselves out of the powers granted to the General Government these rights or protection to their citizens; these States which never granted or meant to grant to the Federal Government any such authority, find them-

[1] id 1151, 1153.

selves by this bill **invaded and defrauded of the right of determining who shall hold property and who shall not** within its limits, who shall sue and be sued, and who shall give evidence in its courts. . . . **If you can determine who shall hold property in a State then you can enact laws for the protection of the owner in its possession. Then also you can determine who shall not hold property within a State** . . . Such an assumption of power on the part of Congress ought to arouse the people of the whole country to a sense of impending danger.[2]

In the House, the bill's leading opponents were Rogers of New Jersey, Kerr of Indiana, and Bingham of Ohio. Here is what they had to say on the point in question.

Rogers speaking on March 1, 1866:

Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with **these statutes and the local regulations of a State**, then, by parity of reasoning, it has a right to enter the domain of that State, and inflict upon the people there, without their consent, the right of the Negro to enjoy the elective franchise to the same extent that it is accorded to the white men in that State.[1] . . .

Kerr on March 8, 1866:

This bill rests upon a theory utterly inconsistent with and in direct hostility to every one of these authorities. It asserts **the right of Congress to regulate the laws which shall govern in the acquisition and ownership of property in the States**, and to determine who may go there and purchase and hold property, and to protect such persons in the enjoyment of it.

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[2] S. p. 478.

[1] H. pp. 1121-1122.

The right of the State to regulate its own internal and domestic affairs, to select its own local policy, and make and administer its own laws for the protection and welfare of its own citizens, is denied.[1]

Bingham on March 9, 1866:

Now, what does this bill propose? To reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws.[2] . . .

(c) **Explanation in President Johnson's Veto.**

Finally, let us see whether President Johnson's veto showed, as the government claims,[3] that the bill was not aimed at making the Negro "legally competent to own and acquire property."

Referring to the second section of the bill as intended "to afford discriminating protection to colored persons in the full enjoyment of all the rights secured to them by the preceding section," the President had this to say:

This section seems to be designed to apply to **some existing or future law of a State** or Territory which may conflict with the provisions of the bill now under consideration. It provides for counteracting such **forbidden legislation** by imposing fine and imprisonment upon the legislators who may pass such **conflicting laws**, or upon the officers of [redacted] who shall put or attempt to put them into execution. **It means an official offense—not a common crime committed**

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[1] id H. p. 1270.

[2] id H. p. 1293.

[3] Govt. br. 30.

> against law upon the persons or property of the black race. Such an act may deprive the black man of his property, but not of the right to hold property. It means a deprivation of the right itself, either by the State judiciary or the State legislature. It is therefore assumed that under this section members of State legislatures who should vote for laws conflicting with the provisions of the bill, that judges of the State courts who should render judgments in antagonism with its terms, and that marshals and sheriffs who should, as ministerial officers, execute processes sanctioned by State laws and issued by State judges in execution of their judgments, could be brought before other tribunals, and there subjected to fine and imprisonment for the performance of the duties which such State laws might impose. The legislation thus proposed invades the judicial power of the State.[1]

We submit the foregoing evidence so that the Court may decide whether the opposing briefs have presented a true version of the congressional purpose that was behind the Civil Rights Act of 1866.

It seems to us, however, that one could not wish for a more reliable aid to the Court's judgment on this question than the "eye-witness" report that was given that very year by Supreme Court Justice Swayne, in the course of an opinion rendered by him while sitting as a Circuit Justice, and with his words we conclude this portion of our discussion:

> Legislative oppression would have increased in severity. Under the guise of police and other regulations, slavery would have been in effect restored. . . . It was to guard against such evils that the second

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[1] McPherson, *The Political History of the United States During the Reconstruction*, 76 (1871).

> [i. e., the enabling section] of the [thirteenth] amendment was framed. . . . **Almost simultaneously with the adoption of the amendment the course of legislative oppression was begun. Hence, doubtless, the passage of the Act under consideration.**[1]

B.

SUCH A CONSTRUCTION WOULD BE CONTRARY TO ITS USE AND INTERPRETATION SINCE ITS ENACTMENT.

From the purpose and meaning given to the statute in 1866, we turn now to consider how it has been interpreted and used in the century that has intervened.

The government brief takes great pains to point out that the statute has never been repealed and its constitutionality has been "vindicated" (22-23). This we do not deny. When, however, the government insists that it has not been somewhat of a "dead-letter," we may be excused for quoting one of the learned counsel on the NCADH brief who has apparently made a close study of its history:

> Section 1982 has led a relatively quiet existence and, as applied to real estate, has shown few, if any signs of life. It has been mentioned in three Supreme Court decisions but has been given sufficient weight in only one.[2]

To the three cases cited by him—*Buchanan v. Worley,* 245 U. S. 60 (1917); *Oyama v. California,* 332 U. S. 633 (1947); and *Hurd v. Hodge,* 334 U. S. 24 (1948)—we would add another: *Corrigan v. Buckley,* 271 U. S. 323 (1926).

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[1] *U. S. v. Rhodes,* 27 Cas. 785, 793 (Cir. Ct. Ky., 1866).

[2] Joseph B. Robison, *supra* 3, fn. 1, 463-464.

In the earliest of these, *Buchanan*, it is quite evident that the statute, as well as the Fourteenth Amendment, which was also invoked, was used to challenge a **law**, not private conduct. An **ordinance** of the City of Louisville prohibiting Negroes from living in any block in which white residents predominated, and vice versa, was declared to be violative of the Act of 1866 and its re-enacted 1870 counterpart, because—

> The right which the **ordinance** annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person.
>
> It is urged that this proposed segregation will promote the public peace by preventing race riots. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished **by laws or ordinances**. . . .[1]

How do the three principal briefs regard this case? The petitioners[2] and the NCADH brief[3] cite it only to establish its constitutional validity under the authority of the Fourteenth Amendment, which, as we have said we do not question. The government, however, thinks it should be **repudiated because** it confines the statute to a narrow scope" that does "not faithfully reflect the setting of 1866 or subsequent history."[4]

Let us look at the next case in point of time, *Corrigan v. Buckley*. There the court, presaging one of the prin-

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[1] 245 U. S. 81. Emphasis added.

[2] 24.

[3] 73.

[4] 27-28. *Hurd v. Hodge* is included in this repudiation. See *infra* 32.

ciples laid down in *Shelley v. Kraemer*, 334 U. S. 1 (1948), by holding that a restrictive covenant does not by itself violate the constitution, refused to reverse the courts of the District of Columbia which had enjoined violation of the covenant. The result of the case seems at first blush to be contrary to *Shelley*. But, as the court in *Shelley* explained, the injunction in *Corrigan* was by a federal, not a state court; hence, no state action was involved as in *Shelley*, and the question of the validity of court enforcement by a federal court had not been put "properly before the Court" (p. 8). Although the Petitioners' and NCADH briefs criticize the "dicta" in *Corrigan* for confining the reach of the Thirteenth Amendment,[1] they seem to take the following passage about the Act of 1866 "lying down":

> The claim that the defendants drew in question the "construction" of §§ 1977, 1978 and 1979 of the Revised Statutes, is equally unsubstantial. The only question raised as to these statutes under the pleadings was the assertion in the motion interposed by the defendant Curtis, that the indenture is void in that it is forbidden by the laws enacted in aid and under the sanction of the 13th and 14th Amendments. Assuming that this contention drew in question the "construction" of these statutes, as distinguished from their "application," it is obvious, upon their face, that while they provide, inter alia, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, **they, like the constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property.** (271 U. S. at 331. Emphasis ours.)

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[1] At 17 and 18 respectively.

Let us now pass to the next in time of the four cases, *Oyama v. California.* Strangely enough, this case is not even mentioned in the Petitioners' or the ACADH brief, and is referred to by the government mainly to prove that Section 1982 is constitutional under the Fourteenth Amendment because it was re-enacted after the adoption of that amendment. Since, however, it is one of the few cases in which application of the section to the subject of real estate was approved by this court, it deserves a closer look.

The court there upheld the **legal right** of an American citizen of Japanese parentage to own land in the face of the California Alien Land Law, which the court found was racially discriminatory. If we substitute "Black Code" for "Alien Land Law", we are right back to the type of situation against which, as we have seen, the Civil Rights Act of 1866 was directed. The case therefore could have been decided, without any stretching of the statute, upon what is now Section 1982. It is no wonder, then, that Chief Justice Vinson, speaking for the Court, refers to it in a single sentence, with a footnote quoting the language of the section. The sentence reads as follows:

> By federal statute, enacted before the Fourteenth Amendment, but vindicated by it, the states must accord to all citizens the right to take and hold real property (334 U. S. at 640).

This reference to the Fourteenth Amendment makes it appropriate at this point to pause and go back to the year 1866. For, it was also in that year, only two months after it had enacted the Civil Rights Act, that Congress adopted the joint resolution proposing the Fourteenth Amendment for submission to the states.[1] The result was

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[1] Fleming, *Documentary History of Reconstruction,* Vol. I, 478 (1906).

that "**The Civil Rights Bill of 1866 was practically superseded by the first section of the Fourteenth Amendment,**"[2] and consequently "has had little impact on the course of events."[3]

True, the Civil Rights Act of 1866 was substantially re-enacted in 1870, after completion of the adoption of the Fourteenth Amendment by the states in 1868. But what was the manner of its re-enactment? Hardly one to indicate that it was anything but a perfunctory "let's make sure" appendage hooked on at the very last minute to a piece of legislation whose very title (until that last moment) indicated that its purpose was the important but limited one of implementing the recently adopted Fifteenth Amendment by providing specific remedies, including criminal penalties, "to enforce the Right of Citizens of the United States **to vote** in the several States of this Union."[1] (Emphasis ours.)

In any event, and returning now to *Oyama*, the mere fact that the section under consideration was re-enacted after the adoption of the Fourteenth Amendment evi-

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[2] Stephenson, *Race Distinctions in American Law*, 106 (1911).

[3] Robison, *Housing—The Northern Civil Rights Frontier*, 13 Wes. Res. L. Rev. 101, 109 (1961).

[1] The bill was introduced in the House on April 18, 1870, and in the Senate on April 19, as "A bill to enforce the fifteenth amendment to the Constitution of the United States." Cong. Globe, 41st Cong., 2d Sess., H. p. 2755 and S. p. 3479. It was passed by the Senate on May 20, 1870 (id S. p. 3689) and by the House, on an agreed conference report on May 27, 1870 (id. H. p. 3884). On the very day of its passage by the Senate, indeed after the final vote was taken, Senator Steward successfully moved "to amend the title by adding 'and for other purposes.'" (id S. p. 3690). Up to that moment the bill was being considered and the debates on it are recorded in the Congressional Globe as dealing with "Enforcement of Fifteenth Amendment." The incorporation of the Act of 1866 by way of a brief section (18) seems not to have been given any attention throughout the long and vigorous debates on the bill.

dently carried no additional weight with the court in that case, except for the incontestable proposition that the section was now "vindicated", i. e., constitutionally valid—a proposition which undoubtedly had been shrouded in considerable doubt so long as the constitutional authority for this section could be found only in the anti-slavery prohibition of the Thirteenth Amendment[1] The entire tenor not only of the opinion of the Chief Justice, but even more so of the concurring opinions, clearly indicates that the decision in *Oyama* was based primarily on constitutional grounds and not at all on the statutory survivor of the Civil Rights Act of 1866.

But if further confirmation is needed for the inutility of the statute to provide relief against private conduct, the remaining case, *Hurd v. Hodge, supra,* must certainly remove any possible doubt. Decided on the same day as *Shelley,* the court there held, in a situation reminiscent of *Corrigan,* that enforcement of a restrictive covenant even by a federal, as distinguished from a state, court was unconstitutional and violative of the statute as well. Speaking for the Court, Chief Justice Vinson, after pointing out, as he had implied in *Shelley,* that *Corrigan* could not "properly be regarded as an adjudication of the issue" presented in *Hurd,* had this to say about the statute:

> We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. **The action toward which the provisions of the statute under consideration is directed is governmental action.** Such was the holding of *Corrigan v. Buckley, supra.*

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[1] See *Hurd v. Hodge,* quoted *infra* ; *Bell v. Maryland,* 378 U. S. 226, concurring opinion of Justice Goldberg at 292-293; and Stephenson, *supra* 109.

In considering whether judicial enforcement of restrictive covenants is the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve.

Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States. . . .

Moreover, the explicit language employed by Congress to effectuate its purposes leaves no doubt that **judicial enforcement** of the restrictive covenants by the courts of the District of Columbia is prohibited by the Civil Rights Act. (31-34; emphasis ours.)

Where does all this leave the petitioners and the *amici*, with their thesis that Section 1982 was not intended in 1866 and should not now be construed as being limited to state or government action? To the petitioners the language of the Chief Justice "is at most dictum, which is not in harmony with either the prior or subsequent opin-

ions of this Court."[1] The only prior decision cited is an opinion by District Judge Tueber in *U. S. v. Morris*, 125 Fed. 322, decided in 1903, which, like all the cases since *Hurd*, did not involve application of the specific statute, Section 1982, which is now under discussion. Counsel on the NCADH brief are content to dismiss *Hurd* merely with a footnote comment that its "erroneous dicta" require "clarification."[2]

The government, on the other hand, apparently senses the enormity of the obstacle raised by *Hurd* to its contention of non-requirement of governmental action. It therefore makes a valiant effort to explain it away. It does not disagree with it. On the contrary, it calls it "the dispositive ruling on the point." Here is its reasoning:

> Since only two-thirds of the lots in a single block in the District of Columbia were covered by the covenants in suit . . . it could not be clearer that the court there construed Section 1978 [Section 1982, U. S. C. 42] as reaching any substantial exclusion from housing on racial grounds—including, of course, the far more significant fencing-out involved in the present case.
>
> Our previous discussion shows that ruling to be entirely faithful to the text of the statute and its legislative history.[3]

Now, observe the very next three sentences:

> It remains, however, to show that Section 1978 annuls measures which have such an effect, although not in the shape of laws or offices. The decisions invoked here do not go so far. Indeed, there is language

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[1] Pet. br. 17.

[2] NCADH br. 83, fn.

[3] Govt. br. 37-38.

to the contrary in some of these opinions. *E. g., Hurd v. Hodge, supra,* 334 U. S. at 31.[2]

Of course, the language of *Hurd* is "to the contrary." The government said so very emphatically in a prior passage, when it took the court to task for a "grudging reading" and a construction that did not faithfully reflect the setting of 1866 or subsequent history", and concluded that "confining section 1978 to that narrow scope would require repudiation of several decisions in this Court, including *Buchanan v. Warley,* and *Hurd v. Hodge,* supra."[3]

A finer example of sophistry can hardly be imagined: First the government treats *Hurd* as a **good** case, because: a) it resulted in a prohibition of Negro exclusion in a situation in which only a part, and not the whole of an area, was affected by the attempted restriction; b) this means that racial exclusion is prohibited even when it is not total, so long as it is a "substantial" or "significant fencing-out"; and c) since the court's decision was admittedly based on Section 1982, this means that Section 1982 may be invoked to prohibit any kind of "substantial" or "significant" fencing-out of Negroes. What we ask, has all this to do with **the specific question whether a pre-requisite to the application of the section is governmental action?** We do not deny that proper application of the section, against some kind of **governmental** action, e. g., court enforcement, may in some situations, as in *Hurd,* result in prevention of a non-total type of racial exclusion. But how does this prove that *Hurd* removed **the requirement of governmental action as a condition to application of the section in the first place?** Does not the clear language of the court indicate the contrary?

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[2] id 38.

[3] id 27-28.

At this point, however, confusion becomes worse confounded. *Hurd* now becomes one of the **bad** cases, along with *Corrigan*. Both "require repudiation!"

We respectfully suggest that instead of resorting to such legerdemain the government would do well to study the crystal-clear words of Mr. Justice Black, which, though uttered in the course of a dissenting opinion, probably present as succinct and illuminating a summary of the existing case law on the subject under discussion as will be found anywhere:

> Thus, the line of cases from Buchanan through Shelley establishes these propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to "inherit, purchase, lease, sell, hold, and convey" property **prohibits a State**, whether through its legislature, executive, or judiciary, from preventing the sale on grounds of the race or color of one of the parties. Shelley v. Kraemer, supra, 334 U. S., at 19. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership; "the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." Buchanan v. Warley, supra, 245 U. S., at 74. This means that the **property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling as when the property owner chooses not to sell to a particular person or not to admit that person, then, as this Court emphasized in Buchanan, he is entitled to rely**

> on the guarantee of due process of law, that is, "law of the land," to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use. *Bell v. Maryland*, 378 U. S. 326, 330-331. (Emphasis added.)

Before concluding this subdivision of our argument, we would remind the Court that we are not here dealing with the meaning of the term "government action". That problem will be taken up in connection with the discussion of the Fourteenth Amendment and the concept of "state action" in relation thereto. Nor are we here concerned with whether Congress can, under Section 5, the enabling section, of that Amendment, enact legislation which, though directed at private conduct, is deemed by Congress to be necessary in order to effectuate the prohibitions of that amendment; as, for example, by enacting a "fair housing law."

Here the question is a simple one and requires a simple answer. The petitioners and their supporting *amici* contend that a particular piece of congressional legislation was not meant by the Congress of 1866 and is not today regarded by this Court as being limited to discrimination by governmental action. Our argument thus far has been directed at this specific contention, at answering only this question: Was the application of Section 1982 originally intended to require, and does it now require, that the discrimination be by, or in the form of, governmental action? We entertain the hope that we have succeeded in showing that the answer is decisively in the affirmative.

C.

SUCH A CONSTRUCTION WILL REQUIRE THE COURT TO ASSUME DIFFICULT AND NON-JUDICIAL FUNCTIONS.

1. Because the Language of Section 1982 Is Too Broad.

All of the principal briefs seeking to apply Section 1982 to the facts in this case call attention to the importance of **housing** as a cardinal and urgent reason. Some of the briefs, most notably that of the NCADH, devote extensive portions of their discussion to show, in the words of that brief, that "Racial segregation in housing is an immediate and pressing evil," and, that, therefore, the Court "should now declare that the Act means what it says and is constitutionally applicable to bar discriminatory sales of real property!"[1]

But, it is not only real property that the Section covers. It also includes "personal property." As to this, not a word is said in any of the briefs. This is not surprising. For not only does the inclusion of personal property reinforce the view that the framers of the 1866 Act could not have intended it to extend to private, as distinguished from governmental, discrimination. Its continued presence in today's Section 1982 makes it difficult, if not impossible, for the court to construe it so.

What, we ask, could the Congress of 1866 have had in mind when it made a Negro's right to buy, sell, and hold "personal property" the same "as is enjoyed by white persons!" If we construe the statute as merely prohibiting any **laws** from restricting the Negro's **legal rights** in such property unless the white man's rights are similarly

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[1] NCADH br. 8.

restricted, the Congressional purpose becomes clear and free from any difficulty of application.

This purpose arose out of the restrictions directed against Negroes with respect to certain kinds of personal property. Such restrictions were a part of all the Black Codes and were retained even after the Negro was emancipated. As one eminent authority has written:

> The Southern States had been afraid of the free Negro. He was a sort of irresponsible being . . .. As one turns to the first laws passed by the Southern States after Emancipation, he should keep in mind that these States were only grappling with the old problem . . ..[1]

The author then proceeds to describe those local **legislative** restrictions. Among them, in most of the states of the South, it was unlawful for a Negro to buy or possess, or for anyone to sell to a Negro, any knife, sword, firearms or ammunition without a special license.[2] Many of them also prohibited the purchase by, and the sale to him of intoxicating liquor.[3]

When, therefore, Congress set itself to the task of prohibiting **all legislative** discrimination, it made sure that even restrictions on such things as fire-arms and liquor would be the same as were imposed on white persons. It did so by adding the words "personal property." This would create no problem because, as we have shown, the Act was aimed only at **laws**, not private individual conduct.

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[1] Stephenson, *supra*, 38-39.

[2] id 43-44.

[3] ibid.

It is only when the Section is given the construction that petitioners and *amici* claim for it here, that problems are created, a Pandora's box of problems. For would it not mean that whenever an individual sells **anything** he must refrain from racial discrimination? Would it not mean that any offer or indication of a desire to sell **any** item, be it food, clothes, furniture, even a family heirloom, would be constricted by the statute? Would it not mean that the statute would subject not only large distributors and retailers, but even the small shop-keeper, to the hazard of a suit charging discrimination?

But even if we overlook the inclusion of personal property, the fact that the section does not limit the kind of **real estate** that is within its sweep likewise tends to contradict the construction claimed for it. Under that construction, every type and form of real property, commercial, farming, and recreational, as well as residential, would be covered. And within the residential field, not only subdivisions, large and small, not only apartment houses, large and small, not only flats and single residences, but even a single rented room in a residence and the proverbial shack in the woods would be subject to the statute. For it makes no distinction as to size or importance—something which the petitioners and their supporting *amici* frequently overlook when they emphasize the "substantial" or "significant" role of a subdivision as justifying application of the statute. Again we point out that here we are discussing the prohibition of **this specific statute.** We are not here considering whether Congress has the **power,** under either the Thirteenth or the Fourteenth Amendment, to enact some other kind of legislation, e. g., a fair housing law, that would by appropriate definitions recognize such distinctions.

The government does not think that the statute's broad language raises much of a problem. Although it admits

that "its application in the present context, unfamiliar to the framers, has no established precedent", it urges that no resort be had to "'ingenious analytical instruments' to avoid giving Section 1978 [i. e. 1982, U. S. C. 42] 'a sweep as broad as its language.' "[1]

Do we then, understand the government as saying that the Court should make its decision purely *ad hoc*? On a matter which the government described in its Memorandum petitioning this Court to grant certiorari as raising a question that is "one of large public importance",[2] is it seriously suggesting that the Court ignore what its decision may mean as an exercise of the judicial process. Is that process no longer to be one of "principled" decision-making? Without going further into what we believe is the issue that lies at the very core of this case, one which we will consider more fully when we take up the consequences of applying the Fourteenth Amendment to this case, and considering only the application of Section 1982, we cannot do better, perhaps, than again to defer to the view of the learned counsel on the NCADH brief:

> It hardly needs to be said that, if the courts were persuaded to accept a broad interpretation of Section 1982, the effect would be tremendous. A strong factor working against such an interpretation is that it would do too much. **It would instantly create a fair housing law for all states and territories, without any of the exemptions that are usually taken for granted.** [In footnote: "Even the broad fair housing laws of Connecticut, New York, and Rhode Island, exempt the rental of one apartment in an owner-occupied two-family dwelling.] **Moreover, since the Act is not limited to real property, the provisions dealing with per-**

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[1] Govt. br. 24.

[2] At p. 1.

sonal property might constitute a nationwide law against discrimination in all retail stores."[1] (Emphasis added.)

To all of which we add our wholehearted "Amen!"

2. Because Section 1982 Provides No Enforcement Remedy.

The language of Section 1982 reproduces a portion of what was the first section of the Civil Rights Act of 1866. Here is that original section, with the words now constituting Section 1982 being shown in italics:

> That *all persons born in the United States*[2] and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, *shall have the same right, in every State and Territory* in the United States, to make and enforce contracts, to sue, be parties, and give evidence, *to inherit, purchase, lease, sell, hold, convey real and personal property,* and to full and equal benefit of

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[1] Robison, *supra* 3, fn. 1, 465. As to the propriety of considering *consequences* in construing a statute, the following words of Mr. Justice Miller, speaking for the Court in the *Slaughter-House Cases,* are pertinent: "The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; . . . the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt." 83 U. S. 394, 409 (1873).

[2] This phrase is now "All citizens of the United States."

all laws and proceedings for the security of person and property, *as is enjoyed by white citizens,* and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

It will be seen that nowhere in this entire first Section of the original Act is there any mention of any **remedy** or **right to sue** for any kind of relief, civil or criminal. The section is thus described by an eminent authority, in an article cited several times in the NCADH brief:

> [It] does no more than make a general statement of constitutional policy and carries with it no civil or criminal sanctions. . . . As was said by Justice Strong in *Strauder v. West Virginia* this section puts in the form of a statute what was substantially ordained in the Fourteenth Amendment. . . . It contains a partial list of the rights which the Amendments' framers thought they were protecting, when they placed the privileges and immunities clause into the Amendment. **The only purpose now served by [it] is as an incomplete compendium of rights the violation of which may give rise to civil suit under other sections of Title 8** [now Title 42].[2]
>
> The author then makes the following observation on the section that was added in 1871 and is now Section 1983 of Title 42 U. S. C.
>
> Of far greater utility is section 43 of Title 8. It provides that every person who, **under color of state law,** subjects any person within the jurisdiction of the United States to the depreciation of any "rights, privileges, or immunities secured by the Constitution and laws" shall be liable to the injured party in an

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[2] Gressman, *The Unhappy History of Civil Rights Legislation,* 50 Mich. L. Rev. 1323, 1354-1355 (1952).

action at law or equity. Derived from the 1871 Act, **this section concerns state action only.**[3] (Emphasis added.)

The foregoing passage seems to bring out several highly significant points regarding the Civil Rights Act of 1866. **First**, the section of the Act out of which present Section 1982 was carved was simply a "general statement of constitutional policy" and by itself afforded no civil or criminal remedy. **Second**, at the time of its enactment the Act contained no civil remedy at all. **Third**, when a civil remedy was added in 1871, it was limited to violations of the Act under color of state law. And in connection with this third point, we would add: **Fourth**, the language of the "color of state law" limitation incorporated in the civil remedy of 1871 was identical with the limitation imposed on the **criminal** remedy, which had been the only remedy provided in the Act of 1866 for violation of the rights listed in its first section; and, **Fifth**, this same limitation now appears in Section 1983, and, as the District Court observed in its Memorandum Opinion, "alone of the civil right statutes, other than the Civil Rights Act of 1964, provides for a right of action."[1]

The foregoing analysis serves not only to confirm our thesis that the legislators of the Act of 1866 had only state action in mind, but also that as a result of its derivation from that Act the language of the present statute has nothing in it to afford petitioners the relief they seek in this case.[2]

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[3] ibid.

[1] Appendix to petitioners' brief, 18a.

[2] The same view as to the inutility of the statute was apparently expressed by the late Professor Mark DeWolfe Howe, when he testified at a House hearing on the 1966 Fair Housing Bill. When asked about the effect of the recent decision in the *Guest* case, in connection with the conduct of individuals in the sale of private

Interestingly enough, the government seems to agree with our analysis but only partially with our conclusion. In a footnote it admits that "individual action violating the substantive guarantees of [Section 1982] would in no event subject the offender to civil damages under 42 U. S. C. 1983 or criminal penalties under 18 U. S. C. 242 (both of which reach only acts done 'under color of law')."[3]

Apparently the government is unwilling to go so far as to claim that the Court in this case should "fashion" a remedy to give petitioners all the relief they seek under Section 1982, i. e., damages plus various injunctions. It suggests that the Court "make a ruling which, if novel, will operate only for the future, imposing no civil or criminal liability for the past without adequate notice."[1a]

This raises the all-important question of the propriety of the courts, engaging in the function—a highly legislative function—of "fashioning" a remedy. Our views on this question will be set forth later when we discuss the same problem in relation to the Fourteenth Amendment (Point II, B, infra).

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property, and whether it was not true that "there are no cases holding on that", he replied: "It is probably because we have no legislation to deal with that sort of matter." Report of *Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Reps., 89th Cong., 2d Sess., at p. 1576.*

[3] Govt. br. 25, fn. 12.

[1a] id 25.

POINT II.

PLAINTIFFS ARE NOT ENTITLED TO RELIEF UNDER THE FOURTEENTH AMENDMENT BECAUSE—

A. THE STATE IS NOT SIGNIFICANTLY INVOLVED; AND

B. TO GIVE SUCH RELIEF WILL REQUIRE THE COURT TO EXERCISE LEGISLATIVE FUNCTIONS UNDER GRAVELY INAPPROPRIATE CIRCUMSTANCES.

Foreword.

For their alternative ground, petitioners invoke the Fourteenth Amendment, in particular the clause in its first section that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Petitioners claim that this clause entitles them to relief even in the absence of legislation.

Our discussion of the validity of this claim must begin with an understanding on two points. First, we are not here concerned with the question of what may or may not be done under Section 5 (the enabling section) of the Fourteenth Amendment. To use the language of Mr. Justice Stewart, we "deal here only with the bare terms of the Equal Protection Clause."[1] Second, it must be shown

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[1] *United States v. Guest*, 383 U. S. 745, 755 (1966). The importance of this distinction was stressed in the brief submitted last August by Attorney General Clark when he appeared before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency. Discussing the "false analogy between judicial enforcement and congressional enforcement of the Equal Protection Clause", it went on to say: "The power of a court to enforce the clause arises directly from the clause itself, which speaks only of what states are forbidden to do. . . . Hence, courts enforcing the Clause can only forbid action by States or their local subdivisions. But the power of Congress to enforce the Clause arises from another section of the Fourteenth Amendment, Section 5 . . ." See Report of the Hearings on August 21, 1967, at p. 11.

that some form of state action is involved in the alleged discriminatory conduct. As to this, the words of Mr. Justice Douglas leave no doubt—

> It is, of course, state action that is prohibited by the Fourteenth Amendment, not the actions of individuals. So far as the Fourteenth Amendment is concerned, **individuals can be as prejudiced and intolerant as they like . . . The line of forbidden conduct marked by the Equal Protection Clause of the Fourteenth Amendment is crossed only when a State makes prejudice or intolerance its policy and enforces it.**[2] (Emphasis ours.)

This, then brings us face to face with the ever recurring problem of what is "state action", and, specifically, with its inner question: When is a state so "involved", or, as it is put in the more recent cases[3], so "significantly involved", that the requirement of state action has been met?

"This Court", as Mr. Justice White has observed "has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discrimination."[4] Although counsel for the petitioners believe they have come upon a "unifying explanation" for "all" the past decisions in the field of discrimination and one that will serve to resolve the issue in this case,[5] we confess we have made no attempt at any such achievement.

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[2] Concurring opinion in *Garner v. Louisiana*, 368 U. S. 157, 177-178 (1961).

[3] e. g. *Reitman v. Mulkey*, 387 U. S. 369, 378 (1967).

[4] ibid.

[5] Pet. br. 47, 49 fn.

We hope the Court will forgive us for saying that a strong deterrent has been the fact that so often "the opinion of the Court" has been accompanied not only by one or more concurring opinions, but also by opinions that are partly concurring and partly dissenting. And to complicate the matter even more, the number of dissenting Justices is at times so great that, as the Court of Appeals in this case observed in commenting on the effect here of the *Reitman* decision, it is quite conceivable that at least as to one of the aspects of our case those who joined in the Court's opinion in that case but disagreed with Mr. Justice Douglas' views might join with the four dissenters in rejecting the presence of state action in a situation like ours.[1]

Nor can we ignore the fact that the issue of state action has been argued innumerable times before this Court, has been plowed over by many pundits of constitutional law, and doubtless has been the subject of frequent and extensive discussions among the members of this Court. For us to attempt a "constitutional exercise" of our own would be presumptuous. *Quod licet Jovi non licet bovi!*

We shall confine our argument simply to pointing out certain fallacies in the material on which the structure of state action in this case is claimed to be supported. This, we believe, will be sufficient to dispose of the argument based upon the Fourteenth Amendment without requiring any deep diving into the waters of constitutional theory.

A.

THE STATE IS NOT SIGNIFICANTLY INVOLVED.

The claim that the state is significantly involved in the alleged discriminatory conduct of the respondents seems to be founded on two theories: One, that the laws and

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[1] Pet. App., 65a, 65b.

regulations licensing and governing a subdivision, and making certain services available to it, result in such involvement; Two, that the subdivision exercises governmental functions. We submit that the argument used to support each theory is fallacious.

1. The Fallacy in the Argument That State Action Results From the Laws and Regulations Licensing, Governing, and Making Services Available to, a Subdivision.

The petitioners and their principal supporting *amici* contend with varying emphasis that state action is present in this case because the state has **licensed** and **regulated** the development of the respondent Mayer's subdivision, and because certain services, like public utilities, and fire and police protection, are **made available** to the subdivision. In answering this contention, we cannot refrain from first calling attention to the anamolous and ironical position in which it places the Attorney General of Missouri, who has sponsored one of the *amicus* briefs.

One would suppose that in a case in which the State is being charged with being "significantly involved" in unconstitutional conduct, an appearance in the case by the State would be for the purpose of **challenging** the charge, either by denying that the conduct was unconstitutional or by denying that the State had anything to do with it. Here, however, we find the Attorney General of Missouri supporting a brief which insists that the State **is** guilty of participating in the discriminatory conduct because its purposes could "only be achieved with the assistance and by the joinder of state action."[1]

What is this "assistance"?

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[1] *Amicus* Brief of Missouri Commission on Human Rights, 3.

According to that brief, it is twofold: One part of it lies in the "detailed and comprehensive zoning ordinances and subdivision regulations";[2] the other in "the state's residence requirements applied to free public education".[3] When these are combined with the discriminatory conduct, says the brief, "the product is de facto segregation."[4]

If that is what the State's assistance consists of, and, if without that assistance the discrimination could not be achieved, then would it not be proper to ask this question: Why has the State not eliminated or corrected these ordinances and regulations and requirements?

The reason is simple and should be obvious. These ordinances, regulations, and requirements are completely "innocent" as a factor in the discrimination, except, perhaps on some metaphysical "but for" theory. On such a theory common sense tells us that state involvement could be shown in every act of every person. As counsel for the petitioners have so aptely put it: "if the act of 'permitting' is 'state action', then every activity of a private person . . . would be state action subject to the strictures of the Fourteenth Amendment."[1]

But, apparently the government and the NCADH group of *amici* do not agree with the petitioners. They, like the Missouri Attorney General, attach great importance to the local laws and regulations, for they regard them as a "delegation of State Powers" to the respondents, sufficient to render their subdivision a political subdivision of the State, even though "no State flag flies over" it

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[2] id 3, 24-27.

[3] id 2, 8-9.

[4] id 22.

[1] Pet. br. 44.

and "none of the respondents wears an official badge of State office."[5] Indeed, the government sees so much significance in these local statutes and regulations that it devotes its entire Appendix of 30 pages to reproducing their text.

The statutes are cited to show the "authority given political subdivisions"; specifically, to construct and repair public roads, and sidewalks, to establish and maintain parks, to have zoning power to facilitate adequate provisions for schools, to maintain peace, and to provide fire protection.[1] Since a subdivision "must have public roads and sidewalks, sewers, parks, access to schools, police and fire protection," and these services and facilities are either "supplied by or in behalf of the State"[2] or are permitted to be assumed by the developer, attention is drawn to the fact that "one of the main attributes of a municipal government is its power to levy assessments" and that respondents have that power also, including the power "if necessary to establish property liens to secure payment of the assessments."[3]

The ordinances of St. Louis County, where the Mayer subdivision is located, are also referred to for the purpose of showing the **power** given to a subdivision developer to exercise governmental functions, i. e. to provide markers, streets, sidewalks, water and sewage systems, fire protection, trees, signs . . . schools and parks."[4]

Finally, the government cites a statute permitting classification of a city or town of between 500 and 3,500

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[5] Govt. br. 13-18.

[1] Govt. br. 15 fn. 3.

[2] id 15.

[3] id 17-18.

[4] id 16 fn. 4.

persons as a city of "the fourth class." This statute leads the government to note that the residents of the subdivision "could incorporate as a municipality if they elected to do so!"[1]

Respondents respectfully submit that in their zeal to equate the Mayer subdivision with a municipality, for the purpose of showing state action, counsel for the government have, to put it charitably, used the aforesaid statutes and ordinances somewhat carelessly. The result is a distorted and misleading picture.

We note, to begin with, the misleading caption that is given to these statutes in the government's Appendix. It reads: "Missouri Statutes on Organization of Municipalities and *Subdivisions*"[2] (Italics ours). Would one not suppose from this caption that at least some of the provisions in these statutes apply to **subdivisions**? Such is not the case. The word "subdivision" appears nowhere. All of these statutes are contained in a chapter of the Revised Statutes of Missouri that is entitled "Provisions Relative to All **Cities and Towns**" (Ch. 71). (Emphasis ours.)

It is utterly pointless, therefore, to attempt to prove by these statutes that the State has conferred on subdivisions the powers that are given to municipalities. Just by way of example, one of the statutes cited (80.260) empowers the Chairman of the Board of trustees of an incorporated town or village to be "a conservator of the peace" and to "have exclusive original jurisdiction to hear and determine all offenses against the ordinances of the town."[3] How, we ask the government, would this prove that the developer of a subdivision or its trustees

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[1] id 16 fn. 5.

[2] Govt. br. 63.

[3] id 63.

or managers could exercise such police power? Another statute (71.340) gives any incorporated city, town, or village, the power to construct public roads, streets, and bridges, "leading to and from" such city, town or village.[2] Does this mean that the developer of a subdivision could give himself or his subdivision that power?

But, it may be asked, what about the power to levy assessments, and to secure them by property liens? That such a power does exist and is commonly exercised by a subdivision is quite true. But does that power come from the statutes governing municipalities? Not at all. Nor does it come from any county ordinance or commission regulations, which we shall presently examine. It is derived simply from the **general law** that accords to a property owner the right to impose restrictions on his own property that are not contrary to public policy. It is on the authority of the **general law**, the law applicable to all property owners, and not of any law empowering or favoring subdivisions only, that "Trust Indentures" conveying the "common areas" of a subdivision such as private streets and parkways, are conveyed to Trustees, and that such Trustees are given the power to maintain these areas and for that purpose to levy assessments. It is also by virtue of that **general law** that "Deeds of Restrictions" governing the size, height, design, and even use, of property in a subdivision may be imposed by the developers or, as is often the case, by the residents themselves, after the lots in a subdivision have been fully or substantially sold. One can only attribute the strange assertions in this part of the government's brief to counsels' apparent unfamiliarity with subdivision development and organization.

In this connection we must also call counsel on the NCADH brief to task for making the remarkable state-

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[2] id 63.

ment that "the developer **must** impose covenants on the use of land within the development which, under the law of Missouri, supersede and take the place of the regulations of the zoning ordinance."[1] The brief cites no statute, no ordinance, no regulation; for none will be found—at least not in Missouri, so far as we know. There is no legal obligation on the developer to impose **any** restrictions. But, if he chooses to do so, the restrictions cannot "supersede", they merely **add** to, those of the zoning law and must be complied with the same as the latter. In that sense it may perhaps be said that the owner's restrictions will "supersede" the zoning law. Our criticism, however, is that the purpose behind the statement seems to be, as in the government's brief, to prove that the developer's power to impose such restrictions is derived from some laws whereby the state has **delegated** special powers to subdivisions that are not accorded to any other kind of real estate. We submit that this is utterly erroneous, and that such power comes simply from the general law governing all real estate, whether it be a tiny parcel of ground or the acreage in a large subdivision.

But, what about the County ordinances? These too are set forth in great array in the Appendix to the government's brief. They too are cited to prove delegation of special powers to the developer of a subdivision. The truth of the matter is that they are **limitations**, not delegations of power. They lay down **requirements**, not benefits. They **restrict**, rather than expand, an owner's rights, if he desires not only to "subdivide" his property into lots (for which he needs no one's approval) but, in addition, to have their dimensions and locations, and the lay-out of the common areas, streets, easements, etc., as well as the Indentures of Trust and Restrictions, made recordable

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[1] NCADH br. 100.

(i. e., acceptable to the County's Recorder of Deeds), so that the individual lot-owners will be assured through such recording as to the dimensions and locations of their lots and that those common areas, streets, and easements will be properly maintained and made available to them and their successors in title. Because the County felt that uncontrolled development of such subdivisions might be harmful to a "co-ordinated, efficient and economical development of the unincorporated portion of the County," it adopted by ordinance a set of "regulations and minimum standards" applicable to subdivisions.[1] It is these regulations that are reproduced in the government's Appendix under the caption "St. Louis County Ordinances."[2]

One will search these regulations in vain to find a single power that is delegated to the developer or his subdivision. And, even when we examine them for **duties** or **functions**, what do we find? The only duty required of the developer, in addition to presenting a plan conforming to the Commission's requirements and paying certain fees, is an obligation to build a public street in two exceptional situations only. Here, again, the government's brief suffers from inaccuracy, when it asserts that a subdivision "**must** have public roads and sidewalks, sewers, parks, access to schools, police and fire protection."[3] We find no such mandatory regulation.

We have said enough, we believe, to show how fallacious is the argument based on **permission** or **license**, and how pointless the copious citation of statutes and regulations in the government's brief. The uselessness of licensing laws and regulations, as a factor in resolving the issue of state action, has never better been stated than by Mr.

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[1] Govt. br. 71.

[2] id 69.

[3] id 15.

Justice Black, though in dissent, in *Bell v. Maryland*, 378 U. S. 226, 333:

> Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices.

We have so far been dealing with licenses and regulations, as forms of "assistance" to the developer of a subdivision. What we have said would apply to the school residence requirements that are given such great attention in the Missouri brief. They too are part of the general law of the State and are as "innocent" a factor in the alleged discriminatory conduct as those licenses and regulations. It would, of course, also apply to the availability of incorporation, of the services of public utilities, of fire and police protection. All these are as available to the general public as they are to the residents of a subdivision.

This does not mean, however, that there are not some forms of "assistance" which, though "innocent" in themselves, may render the State a participant in the discrimination within the Fourteenth Amendment concept of "state action." In those cases, however, it will be found that the "assistance" was given to the **particular** discriminator, and was not one available to the general public under the general law.

A good example is *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961), a case cited in all the principal briefs. There a privately owned and operated restaurant was located in a building constructed with public funds and used for a public purpose, i. e., a municipal parking facility. Refusal of service to a Negro by the restaurant operator was held by the court to be refusal by state action. Why? Because the special assistance

there given by the State to the discriminator, by allowing him to conduct his business on what amounted to state property, rendered the State "significantly involved". Similarly, in *Simkins v. Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (1963), cert.. den. 376 U. S. 938 (1964), the hospital though privately operated, had received "massive financial aid" through funds made available to hospitals willing to participate in the government's Hill-Burton program. Was this not obviously a "significant" involvement of government?

No such type of special aid is claimed in this case. As has been seen, the only "assistance" charged to the State is in the laws and ordinances that are purely permissive and regulatory, and as necessary and available to all as is the general body of state law.

Again we cannot refrain from mustering to our side some observations made not too long ago by the learned counsel on the NCADH brief whose writings we have previously quoted:

> If the prohibition applies to all individual conduct permitted by the State, it applies to all individual conduct. The state action limitation is then a dead letter. It would be better to kill it officially, than to engage in the legal fiction that inaction is action.[1]

2. Fallacy of the Argument Based on the Subdivision Performing Governmental Functions.

As has been said, the petitioners show little reliance on the argument of state action based upon the help given to a subdivision developer through its licensing and regulatory laws. Instead, they rest their position on the theory that respondents are performing services of a governmental nature and that they are therefore a "de facto

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[1] Robison, *supra* 3, at 468.

government." As they so rhetorically put it: "Look not at what the government is doing for Respondents, but at what Respondents are doing for the government."[1]

"When completed", say the petitioners, the subdivision will be a "town", in which there will be recreational facilities for golf, tennis and swimming. "The streets will be open, and community-wide amenities like garbage collection will be communally provided. There will even exist the power to "tax" residents by levying assessments and collecting them judicially."[2]

To support the argument that the exercise of such functions even by a private person is sufficient to meet the requirement of state action, counsel for petitioners review a number of familiar cases to show that this theory of *governmental function* provides a "unifying explanation". In the traditional view, they argue, the focus was "on 'state' rather than 'action'."[3] This is unsatisfactory, say the petitioners, because it has been employed to require a "property law nexus", and such a requirement would be inconsistent with the decisions in cases in which such property connection was so "tenuous" as to be practically non-existent, as e. g., in *Hampton v. Jacksonville,* 304 F.2d 320 (1962), cert. den. 371 U. S. 911 (1962) and in *Smith v. Holiday Inns of America,* 336 F.2d 630 (1964), or even completely non-existent, as in the voting cases culminating in *Terry v. Adams,* 345 U. S. 461 (1953) and, most pointedly, they feel, in *Marsh v. Alabama,* 326 U. S. 501 (1946).

Petitioners' purpose in thus shifting the focus of inquiry is to avoid explaining away the inescapable fact that the property here involved is **private** property. Their

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[1] Pet. br. 40.

[2] id 51.

[3] id 41.

approach is not new, and it has been sharply criticized as being confusing and perhaps even a little dangerous.[1] However, for the sake of argument, we will accept it. For we believe that a demonstration of how inapplicable it is to the present situation, will point up, perhaps better than anything else, the vice that underlies the whole structure of petitioners' case under the Fourteenth Amendment.

We must begin by taking a close look at *Marsh v. Alabama,* supra, the case so heavily relied on by petitioners, as well as by the government and the NCADH. This case, say the petitioners, "helps immensely to give form and substance" to their answer of what is meant by "action" in the concept of state action.[2]

It must be admitted that at first blush *Marsh* seems to have a striking resemblance to our case, for it involved a privately owned "company town". Here is the description of the town as given in the opinion of the Court by Mr. Justice Black:

> The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that, it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from

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[1] Abernathy, *"Expansion of the State Action Concept Under the Fourteenth Amendment,"* 43 Cornell L. Q. 375, 406-407 (1958).

[2] Pet. br. 44.

which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which cannot be distinguished from Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, **make use of a company-owned paved street and sidewalk** located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.[2] (Emphasis ours.)

Into this town came a member of the religious order known as Jehovah's Witnesses, and attempted to distribute religious literature **while standing on a sidewalk** near the post office. She was warned that this was a violation of a company notice, posted in the stores, prohibiting street peddling and solicitation, without a permit. When she was "asked to leave the sidewalk", she refused and was arrested and charged with violating an Alabama Statute making it a crime to remain on the premises of another person after being warned not to do so. She was convicted and when her conviction was

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[2] 326 U. S. 502-503.

affirmed by the Appellate Court of Alabama, she appealed to the United States Supreme Court.

On the appeal the State of Alabama contended that the property involved was private and that therefore the corporation's right to control the inhabitants of the town was "coextensive with the right of a homeowner to regulate the conduct of his guests."[1] To this the Court, in reversing the conviction, replied, as the petitioners have pointed out, "We do not agree that the corporation's property interests settle the question."[2]

But then the Court added the following sentences, the real significance of which seems to have been utterly lost on the petitioners and all the *amici* who have cited the case:

> **The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . .** Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated **primarily to benefit the public** and since **their operation is essentially a public function,** it is subject to state regulation. And though the issue is not directly analogous to the one before us we do want to point out by way of illustration that such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce. . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical in-

[1] id 506.

[2] ibid.

terest in the **functioning of the community** in such manner that the channels of communication remain free.''[1] (Emphasis ours.)

To explain why we have emphasized some of the language in the above quotations we must now turn to a later case, also involving distribution of religious literature on private property by one of the Jehovah's Witnesses. This case, *Watchtower Bible & Tract Society, Inc. v. Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433 (1948); cert. den. 335 U. S. 886 (1948) rehearing den. 335 U. S. 912 (1949), is not mentioned in the government and NCADH briefs. Petitioners cite it briefly and only to show that the decision in *Marsh* must not be construed to mean that the householder in that company town ''acting individually'' could not ''constitutionally evict religious proselysizers from their homes'', for, they say, it ''has never been held that the First Amendment runs into one's living room.''[2]

The private property on which the Jehovah's Witnesses sought to distribute their literature in the *Watchtower* case was perhaps not a ''town''. Was it just a ''home'' or a ''living room''? Here is how it is described in the opinion of the New York Court of Appeals:

> Defendant, as a private proprietor, owns in the borough of The Bronx in New York City, **a residential community** called Parkchester, which is said to be the **largest of its kind in the world**, covering 129 acres and **housing 12,000 family units** made up of some 35,000 people, in 171 adjoining and ''interrelated'' apartment houses. These buildings are seven to twelve stories high. Through Parkchester run two public highways and in it are a number of private

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[1] id 506-508.

[2] Pet. br. 45.

streets, lanes and parks, as well as shops, offices, and automobile service stations, the latter operated by tenants of defendant. All of the apartments are held under written leases from defendant. Each such apartment lease binds the tenant to comply with such rules and regulations as the landlord shall from time to time deem necessary for the safety and care of the buildings, "and the preservation of good order therein, as well as the comfort, quiet, and convenience of other occupants of the building" (433). (Emphasis ours.)

The owner of this "residential community" published a regulation which would have prohibited the distribution of literature by the Jehovah's Witnesses "in any apartment building in the Parkchester development." The Witnesses sued to have this regulation declared unconstitutional under both the New York and the Federal constitutions. The New York Courts held against them and the United States Supreme Court refused to review that holding.

How can this be explained in the face of *Marsh v. Alabama*? The New York Court of Appeals gives the answer, and in it lies the explanation for our emphasis of some of the language of Justice Black in *Marsh* and our belief that petitioners' theory of "governmental function", useful as it may be, has no application to our case. Here are the pertinent passages from the opinion of the New York Court of Appeals, distingushing *Marsh* as well as *Tucker v. Texas*, 326 U. S. 517, decided the same day as *Marsh*:

> **Marsh's activities all took place on a sidewalk** in Chickasaw, Alabama, a "company town" wholly owned by a shipbuilding corporation. The sidewalk on which Marsh stood as he passed out his pamphlets was thus owned by the corporation, but it was, in

appearance and use, an ordinary public sidewalk in front of retail stores. Justice Black's opinion noted that Lovel v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, and other cases (see People v. Barber, 289 N. Y. 378, 46 N. E. 2d 320) had made it plain that a **municipal corporation cannot ban the distribution of literature on its "streets, sidewalks, and public places"** [326 U. S. 501, 66 S. Ct. 278]. The same rule, for the same reasons, held the Supreme Court, **applied to the sidewalks of Chickasaw,** which differed from similar sidewalks in other municipalities, only in that in Chickasaw title to the sidewalks was in a private corporation. Tucker v. Texas, supra, was a companion case to Marsh v. Alabama, supra, differing only in the circumstance that Hondo Navigation Village in Texas, was owned in its entirety, not by a business corporation, but the United States of America. "According to all indications", the Supreme Court remarked, "the village was freely accessible and open to the public and had the characteristics of a typical American town." . . . While not specifically so stated in the opinion, it seems clear that **Tucker's preaching** and leaflet distribution **was in the streets or sidewalks** of the village, or from door to door, and not inside any residential building.

Both the Marsh and the Tucker cases, supra, seem to rest on the doctrine so clearly stated in Hague v. Committee for Industrial Organization, 307 U. S. 496, at page 515, 59 S. Ct. 954, at page 964, 83 L. Ed. 1423: **"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly,** communicating thoughts between citizens, and discussing public questions. **Such use of the streets and public places** has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." A narrow inner

hallway on an upper floor of an apartment house is hardly an appropriate place at which to demand the free exercise of those ancient rights.

Our purpose in thus briefly analyzing those decisions is to show that they do not (nor do any others of which we know) go nearly so far as appellants would have us to go here. Parkchester, like Chickasaw, Alabama, and the Federal housing community in Texas, is privately owned, but there the similarity as to facts ends. **It is undisputed that this defendant has never sought in any way to limit the Witnesses' activities on the streets or sidewalks of Parkchester, some of which are privately, and some publicly, owned.** (79 N. E. 2d 436. Emphasis ours.)

It should now be evident why we attach even greater significance to *Marsh* than do the petitioners and the *amici*. For, if the case reveals anything, especially in the light of *Watchtower*, it is the all-important distinction between private property that has been **opened up for public use** and private property that has not been so opened up. As Mr. Justice Black observed, in the passage we have quoted from Marsh and now quote again:

> The more an owner, for his advantage, opens up his property **for use by the public** in general, the more do his rights become circumscribed by the statutory and constitutional **rights of those who use it** (Emphasis again added).

It matters not, as these cases show, that the owner controls and exercises governmental functions over a sizeable "town" or a "residential community" of 35,000 people. The important question is: Has he, or to what degree, has he, opened up the property in question "for **use by the public?**"

What is the property here as to which violation of the Fourteenth Amendment is claimed? It is not any of the

"streets, sidewalks and public places" of the respondents' subdivision. The closest the complaint here comes to charging restrictions on such publicly used areas is the allegation that two of the defendants "have prepared or shall prepare a deed embodying certain restrictions on the use of the property sold to individual buyers in said subdivision and on that land which is common to all residents" (Pet. App. 11a). Petitioners do not allege, nor indeed would they have any reason to allege, that these restrictions would be racially discriminatory as to the use of the streets, sidewalks, and public places.

The simple fact is that the only property claimed to be the subject of the unlawful discrimination is "Lot No. 7147", a lot, like all the others, never intended by the owner to be opened "for use by the public in general." These residential lots constitute the **private** portions of the subdivision, just as did the homes in Chickasaw and the apartments in Parkchester. Surely, if the hallways in an apartment in a residential community of 35,000 people can be regarded as "private property" and therefore outside the reach of constitutional prohibitions, a private residential lot in a subdivision must *a fortiori* be regarded as off-limits.

Perhaps the best way to illustrate our point is to ask this question: Would the company in *Marsh* be subject to constitutional restraint whenever it sold or leased a house in its own? Would the owner in *Watchtower* be subject to such restraint in leasing any of the apartments, or the "shops, offices and automobile service stations" in Parkchester? Indeed, may we not sharpen the point even more by asking this question: Suppose that the property is a public utility, say, a local gas or water company. Would its owner be violating the Fourteenth Amendment if he put it on the market but indicated he wanted to sell it only to someone of his own faith or race? We assume, of course, that no restriction would be put on the **use** of the facility,

which would clearly be unlawful, just as we agree would be any racial restrictions imposed by the people of petitioners' imaginary State of Neutrality[1] on its public utilities even though they were "unfranchised." But what about the homes in that imaginary State? Would their disposition be subject to the same considerations as the facilities used by the general public?

We submit that the sensible guide by which to answer such questions is that indicated by Mr. Justice Black in the passages we have quoted from *Marsh*. As was said in an exhaustive law memorandum submitted to a Senate Committee in 1966, in commenting on his "approach" to the problem—

> Such an approach would be more consistent with earlier, as well as more recent, decisions with respect to Fourteenth Amendment violations than to hold that the right to purchase or occupy property without discrimination on account of race is so secured by that Amendment that the individual home owner cannot with impunity refuse to sell or rent his home or any part of it on such a ground.[2]

We cannot better end this discussion than to quote the following commentary by a scholarly writer on the type of generalizations with which counsel for the petitioners embellish their argument on the Fourteenth Amendment:

> An uncautious extension of these generalizations is noted in the theory espoused by some writers to the effect that activities which are "fundamental" or

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[1] Pet. br. 53.

[2] The Library of Congress Legislative Reference Service, memorandum on "The Power of Congress to Prohibit Racial Discrimination in the Rental, Sale, Use and Occupancy of Private Housing", included in Report of Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, 89th Congress, 2nd Sess. on S. 3296, et al., June 1966, 308 at 313.

"indispensable" in our society are, by definition, too important not to be considered as governmental functions, even though completely controlled and operated by private persons. The only problems to be solved under this approach are, first, the delineation of the political theory which demands that government undertake positively to provide all persons with all fundamentals of life, and second, the determination of which aspects of life are "fundamental" . . .

[A]ssuming that general agreement could be obtained to the effect that indispensable functions are governmental functions, or that they relate in some manner to the state even without specific statutory control, then **the problem remains of defining the line between the "fundamentals" and the "non-fundamentals" of life.**[1] (Emphasis added.)

B.

TO GIVE THE PETITIONERS THE RELIEF THEY ASK WILL REQUIRE THE COURT TO EXERCISE LEGISLATIVE FUNCTIONS UNDER GRAVELY INAPPROPRIATE CIRCUMSTANCES.

We come finally to an aspect of this case which we believe reveals more than anything else the vice that lies at its core. It lays bare what, despite the disclaimers of the petitioners and their chief supporting *amici*, is the real purpose of this suit.

Let us assume that this Court reverses the lower courts and adopts the contention of the petitioners that the Fourteenth Amendment applies. Will such a decision automatically give petitioners relief from the alleged discrimination? Not at all. Presumably the case will be remanded to the District Court, with instructions to overrule our Motion to Dismiss and proceed with the trial. At this point, however, the District Court will be faced

[1] Abernathy, *supra* 56, fn. 404-405.

with an interesting question. What is the proper remedy? What specific relief is to be given the petitioners? What particular orders are to be issued to the respondents?

In this respect the present case is quite different from the cases cited by the petitioners and the *amici*. In those cases, the relief followed simply and automatically from a holding of constitutional violation. Let us illustrate. In *Marsh*,[1] as in *Tucker*,[2] the holding of constitutional violation **automatically** wiped out the conviction for trespass and thereby gave the Jehovah's Witnesses the full relief that was asked. In Shelley,[3] it **automatically** enabled the Shelleys to move into the house which the Missouri courts had ordered them to vacate. In *Hurd*,[4] it **automatically** lifted an injunction and allowed Hurd to live in the covenant-restricted neighborhood. In *Barrows*,[5] it **automatically** relieved the defendant from liability for damages in a suit for violation of a racially restrictive covenant. In the group of "sit-down" cases, *Peterson*,[6] *Lombard*,[7] *Bell*,[8] it **automatically** freed the persons convicted under local trespass laws.

Even in the very recent *Reitman* case[9] there was no problem as to remedy, because when the Court there held that the article amending the California constitution violated the federal constitution, the immediate effect was

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1 326 U. S. 501 (1946).
2 326 U. S. 517 (1946).
3 334 U. S. 1 (1948).
4 334 U. S. 24 (1948).
5 346 U. S. 249 (1953).
6 373 U. S. 244 (1963).
7 373 U. S. 267 (1963).
8 378 U. S. 226 (1964).
9 387 U. S. 369 (1967).

to reinstate a California fair housing statute. That statute provided a specific remedy for its violation, i. e. "actual damages and two hundred fifty dollars (250) in addition" for each offense.[10] The Court did not have to search for a remedy. It was there.

But, it may be asked, what about some of the voting cases, in which damages and injunctions were granted by federal courts after a holding that the Fifteenth Amendment had been violated? The answer is very simple. In each of those cases the complainants were able to rely, and did rely, on Section 1983 of Title 42 U. S. C. or a predecessor counterpart thereof.[10a] That Section (set forth in petitioners' brief, 65) is concededly inapplicable here[10b] and is not invoked by the petitioners.

We come back then to our question. What is the proper remedy here? Interestingly enough, the government, in its brief, does not urge the imposition of damages. Its reason is that the case is "novel". It recommends that the remedy should "operate only for the future."[11] But operate in what way? Which of the injunctive orders requested by the petitioners should the Court allow? Should it grant the one that would enjoin the respondents from all racial discrimination in their subdivision "in the future?" Surely the Court has no authority here to issue that kind of injunction, if for no other reason than that this is not a "class action", as was, for example, the suit in *Baker v. Carr*,[12] where the plaintiff was suing for him-

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[10] id 372.

[10a] See, for example, the list of cases cited by Mr. Justice Frankfurter in his dissenting opinion in *Baker v. Carr*, 369 U. S. 186, 286.

[10b] See government brief 25, fn. 12 and *supra* 42.

[11] Govt. br. 25.

[12] 369 U. S. 186 (1962).

self and on behalf of "others similarly situated." Here the petitioners allege that they "bring this action to redress the injury done them." (Pet. App. 5a.)

If it is not to be a "sweeping" injunction, but is to be limited to the particular need of the petitioners only, how is to be framed? An order merely enjoining the respondents from refusing to sell a house to the petitioners solely because of their race, would obviously be too vague to mean anything more than a commandment not to violate the petitioners' constitutional rights. To give it enough specificity, including, for example, an order requiring respondents to bring in a list of available lots, if the one selected by the petitioners has been sold, etc. as was attempted in the Colorado case[13] cited in the NACDH brief,[14] is bound to create the very question that was there raised and which we here raise, namely, "By what authority?"

Strangely enough, counsel on the NCADH brief seem to see in that Colorado case the answer to this question. Let us take a close look at it, for it is so relevant to the important point now under discussion.

The situation there was this: Colorado had enacted a "Fair Housing Act", under which was established an "Anti-Discrimination Commission." The Commission was empowered to issue an order against a violator of the Act "requiring such respondent to cease and desist from such unfair housing practice and **to take such other action as in the judgment of the Commission will effectuate the purposes of this article**" (Emphasis ours). The Commission in that case ordered the respondent to cease and desist **and** "to further effectuate the purposes" of the law it also

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[13] *Colorado Anti-Discrimination Commission v. Case,* 380 P. 2d 34 (Colo. 1962).

[14] At 88-89.

ordered him to do several other specific things, such as preparing a list of lots that were available in the same neighborhood, giving the complainants an opportunity to examine the list and select one for purchase, reporting to the Commission what steps were being taken to carry out its orders, etc.

Counsel quote some sentences from the opinion of the Supreme Court in that case indicating that to protect "a right which is truly 'inalienable'" the courts will, if necessary, "fashion a remedy."[15] But what counsel failed to note was that the Court there apparently did not agree that the right not to be discriminated against with respect to housing was so "inalienable" as to permit the legislature to delegate its power to provide specific remedies for violation of the Act. Such delegation, it said, would be "contrary to the separation of powers provision" of the state constitution."[16] It therefore ordered stricken all parts of the Commission's order except the general one "to cease and desist." The net effect of the Colorado decision was, in the words of an Ohio judge in a case involving constitutionality of Toledo's Fair Housing Ordinance, that "all of the relief sought by the complainant was therefore denied!"[17]

We join with counsel on the NCADH brief in calling attention to the view of the Colorado Supreme Court on the problem of the remedy in our case. We respectfully submit that to try to "fashion a remedy" here, out of the whole cloth of the Fourteenth Amendment, without even such statutory stitching as was present in the Colorado case, would be an impractical and questionable assumption of a legislative function.

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[15] ibid.

[16] 380 P. 2d 42.

[17] *Terry v. City of Toledo,* 194 N. E. (2) 877, 881 (1963); cf. also *Porter v. City of Oberlin,* 205 N. E. (2) 363, 370 (1963).

Moreover, here, as we have pointed out under Point I, C, the particular remedies asked for by the petitioners raise some special difficulties—even if they were to be limited in the manner suggested by the government.[3] For, in addition to the problem of devising an appropriate remedy, the Court will also be obliged to fix the limits of its holding, as in the case of Section 1982? How far is the prohibition against discrimination in "housing" to reach? If only to subdivisions, how big must they be? (Under St. Louis County regulations, a subdivision may be quite small, since there is no minimum acreage requirement,[4] and it need have no streets, parks, or any of the "community" features attributed to the respondents' subdivision). If not just subdivisions, what other kind of "housing"? Apartments? Flats? Single Residences? Rooms in residences? A log-cabin in the woods?

It would hardly be fitting, and we certainly have no desire, to engage in discussion as to the propriety in general of the Court's assumption of legislative functions. We are here concerned only with the narrow question as to whether such legislative functions should be exercised in a particular field, to-wit, discrimination in housing, **in the peculiar circumstances under which such exercise is requested in this particular case.**

We remind the Court that the Fourteenth Amendment has a section (5) which provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article," and in connection with it we recall the words of Mr. Justice Black, concurring in the Court's opinion in *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 278 (1964):

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[3] Govt. br. 25.

[4] See definition of "a subdivision of land", in "Subdivision Regulations", Govt. br. 71.

> The Fourteenth Amendment in and of itself, **without any implementation by a law passed by Congress,** does not bar racial discrimination in privately owned places of business in the absence of state action. (Emphasis ours.)

To this we add the following commentary from an article which is cited approvingly in the NCADH brief:

> [T]he framers and backers of the fourteenth amendment were primarily interested in enlarging the powers of the Congress, not those of the federal judiciary. . . . Piecemeal litigation is hardly an ideal method for the accomplishment of sweeping social reforms.[1]

Even more recently, the previously-quoted counsel on the NCADH brief expressed the same view in language so perfectly in accord with our own position that we are constrained to set forth his observations somewhat fully:

> Certainly there would be serious problems with respect to the self-acting aspect of the fourteenth amendment. If the courts were to hold that Section 1 by itself prohibits racial discrimination, they would have to apply that holding to all forms of discrimination or devise some limitation on its scope. The courts are not likely to embrace the first alternative, even assuming it would be desirable. The second is not impossible. The line could be drawn at action having a 'public effect.' . . . It could be drawn by balancing the benefits of privacy and freedom from governmental control. [Citing Justice Douglas in *Lombard v. Louisiana,* 373 U. S. 267, 274 and Williams, *The Twilight of State Action,* 41 Tex. L. R. 347, at 368.]

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[1] Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts,* 73 Yale L. J. 1353, 1356, 1383 (1964).

> While courts are capable of this kind of agility, they are not as suited as legislatures. . . . As Professor Wechsler said in a closely related context, "I do not hesitate to say that I prefer to see the issues faced through legislation, where there is room for drawing lines that courts are not equipped to draw."[1] **The task could be left to the legislature by retaining the state action curb as to Section 1 of the amendment and abandoning it only as to Section 5. This approach, for which there is historical support, would have the effect of placing with Congress the responsibility of deciding just how far outside the traditional area of state action the ban on bias should be extended** (Emphasis ours).

As Mr. Justice Goldberg pointed out in his concurring opinion in *Bell v. Maryland*:

> In the give-and-take of the legislative process, Congress can fashion a law drawing the guide-lines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations.[2]

But not only would the courts' assumption of such a task involve "drawing lines that courts are not equipped to draw." In the circumstances of this case, and against the background of current congressional deliberation on a national fair housing law, we think it would be gravely

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[1] *Toward Neutral Principles of Constitutional Law,* 73 Harvard L. R. 1, 31 (1959).

[2] 378 U. S. 226, 317. Louis H. Pollak, dean of Yale Law School, expressed a similar view, when he testified at a Senate hearing last August on the 1967 Fair Housing Bill: "A general constitutional mandate of nondiscrimination is not a substitute for a precise code of procedure and remedies." Report of Hearings on S. 1358, 2114, and 2280, Before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency, U. S. Senate, 90th Cong., 1st Sess., at p. 162.

inappropriate. We respectfully refer the court to the admonitory words of Abraham Lincoln quoted at the end of our Summary of Argument.

CONCLUSION.

For the reasons herein set forth, the decision of the courts below should be affirmed.

EPILOGUE.

As this is being written word comes from an eminent Washington news correspondent[1] that passage by Congress of the currently proposed fair housing bill may now be "within sight." An important factor in getting the "few more necessary votes," according to this correspondent, is that the "fair-housing advocates have modified their proposal, substantially cutting back the scope of its coverage."

Can we say anything that will better illustrate our contention that the establishment of a remedy against discrimination in housing should be left to the flexible and democratic "give-and-take of the legislative process" rather than the courts?

Respectfully submitted,

ISRAEL TREIMAN,

SHIFRIN, TREIMAN, SCHERMER

& SUSMAN,
611 Olive Street,
St. Louis, Missouri 63101,
Attorneys for Respondents.

February 25, 1968.

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[1] James C. Millstone, in St. Louis Post-Dispatch, February 25, 1968.